IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 403 OF 2005
ALONGWITH
SECOND APPEAL NO. 472 OF 2005

Shri Bapu Bala Malusare & ors. ... Appellants

V/s

Shri Jaysing Appa Malusare & ors. ... Respondents

Mr. P.B. Shah for the appellants (in both appeals).

Mr. R.S. Kate for the respondent No.1 (in SA 403/05).

Mr. Milind Deshmukh for the Resp.No.2 (in SA 472/05).

CORAM: P.V. KAKADE, J.

DATED: 20TH JULY, 2005

P.C.:

1. Both these appeals arise out of a common judgment dated 25.8.2003 passed by the Addl. District Judge, Baramati, dismissing both the appeals which came to be filed by the appellant and confirming the judgment and decree passed by the Joint Civil Judge, Jr.Divn., Baramati, dated 25.6.1999 decreeing R.C.S. No. 396 of 1993 and R.C.S. No. 429 of 1993.

2. The plaintiffs filed R.C.S. No. 396 of 1993 for

partition and separate possession in respect of agricultural landed property bearing Gat No. 110 (Old gat No.174) admeasuring 2 Hectors 10 R, whereas R.C.S. No. 429 of 1993 was filed by one Manik Malusare who is defendant No.1 in R.C.S. No. 396 of 1993 in respect of the same agricultural landed property for partition and separate possession. Both the suits were tried together and evidence was commonly recorded as well as those were disposed of by common judgment.

The plaintiffs came with the case that the suit land to the extent of 1 Hector 5 R out of the suit property is the ancestral property of these plaintiffs and defendants Balu and Baban. Defendants Dattu, Uttam, Mahadeo and Dattatray (Def.Nos. 4 to 7) are the purchasers of the portion of the land out of the suit property. It was the case of the plaintiff that there was no partition in respect of the suit property amongst those co-parceners. The co-parceners were plaintiff and defendants 2 and 3 of the suit property. According to the plaintiff, defendants 1 to 3 are itending to alienate the suit property unlawfully and defendant No.3 Baban had sold out 1 Hector 2 R land of the suit property to defendant Nos. 4 and 5. It was contended that defendants 4 and 5 are intending to make a

construction on the property on the basis of said sale. On such and other grounds, the suit came to be filed.

Defendant No.1 in R.C.S. No. 396 of 1993 filed purshis and accepted the claim. Defendant Nos. 2 and 3 have adopted the plaint allegations in R.C.S. No. 429 of 1993. Defendant No.2 Bapu and No.3 Baban contested the suit denying that the land to the extent of 1 Hector and 5 R was self-acquired property of plaintiff Jaysingh and defendants Manik and Bapu. It was their contention that the entire suit property was their ancestral property and partitions were already effected amongst them prior to 1967-68 and by virtue of such partitions the suit land was developed in the shares of defendants Bapu and Baban and they were in possession of the said property to the extent of their equal share. On such and other grounds the suit was sought to be dismissed.

3. The learned Trial Judge on the basis of these pleadings and available evidence, adjudicated the dispute on merits and came to the conclusion that it was not established that the land to the extent of 1 Hector 5 R out of the suit property is the self-acquired property of plaintiff Jaysing and defendants Manik and Bapu. It was further held that defendants Bapu and

Baban failed to establish that the suit property developed in their share in a partition prior to the year 1967-68 alongwith their other ancestral properties, as contended. However, it was held that the plaintiff had proved that they were entitled to partition of the suit property and, as such, the decree came to be passed.

Two appeals were preferred against the judgment and order passed by the Trial Court. The learned lower appellate Court Judge, after hearing both parties and perusal of the evidence on record came to the conclusion that the findings recorded by the Trial Court were legal and proper and, therefore, both the appeals came to be dismissed. Hence the present two appeals are filed by the appellants.

4. I have heard the learned counsel for both parties. Perused the record.

5. At the outset, it must be noted that there is no substantial question of law involved in these appeals and the relevant controversy was adjudicated on the factual aspects of the evidence which are seen to be properly appreciated by both the Courts below. The

learned counsel for the appellant sought to raise the question to the effect that the suit was for partial partition without disclosing the actual identity of the properties and, therefore, such partitions should not have been granted. In this regard it must be noted that, it cannot lie in the mouth of the present appellants that there is no disclosure of the partition in the pleadings as partial because it was to the knowledge of the present appellants. In fact, as recorded by the lower appellate Court, both parties admitted that all the lands except the suit land were partitioned between the parties. The evidence has borne out this aspect and, therefore, it must be noted that the specific non-disclosure of the earlier partition in the body of the plaint would not be sufficient to cause any prejudice to the present appellants especially when it was also to his knowledge. At any rate, this cannot be the substantial question of law and, therefore, cannot be entertained at this stage. The learned counsel for the appellant also sought to raise the question to the effect that the suit property had exclusively come to their share in the earlier partitions. However, it must be noted firstly that, it is a pure question of fact and secondly, it is properly adjudicated by both the Courts below recording

concurrent findings to the effect that the present appellant has totally failed to establish that the suit property had exclusively gone to their share in the earlier partitions.

6. In view of this factual matrix, it is clear enough that there is no substantial question of law involved in these appeals and, as such, the appeals must fail.

In the result, both the appeals stand dismissed with no order as to costs.

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